Neutral Citation Number: [2015] EWHC 2190 (Comm)

Case No: 2014-424

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/07/2015

Before:

MR JUSTICE ANDREW SMITH

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Between:

MARITIME INVESTMENT HOLDINGS INC	**Claimant**
- and -	
UNDERWRITING MEMBERS OF SYNDICATE 1183 AT LLOYD'S AND OTHERS	**Third Defendants**

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Ms. Kathryn Straub (appearing in person) for the **Claimant**
John Passmore QC (instructed by **Thomas Cooper LLP**) for the **Third Defendants**

Hearing dates: 12 June 2015

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE ANDREW SMITH

Mr Justice Andrew Smith:

1. This is my ruling on two applications brought in the name of the claimant, Maritime Investments Holdings Inc ("MIH"), and an application by the third defendants, underwriting members of syndicate 1183 at Lloyd's and others. For convenience I shall refer to them respectively as MIH's applications, although that label might be inaccurate, and the defendants' application. The background is an order of Carr J made on 6 March 2015 that MIH give security for the defendants' costs up to and including the exchange of expert evidence in the sum of £360,000 paid into court by 16.00 on 27 March 2015, and that unless the security be given as ordered the defendants have liberty to apply to strike out the claim. The third defendants' costs of and occasioned by the application for security, assessed in the sum of £12,000, were to be paid by MIH by 20 March 2015. Carr J also gave MIH liberty to apply by 20 March 2015 to vary her order or to have it set aside. The security has not been given and the costs have not been paid.

2. MIH's applications were brought by Ms Kathryn Straub, who describes herself as "the sole director/shareholder" of MIH. One of them, dated 13 March 2015, is to vary Carr J's order to reduce the costs from £12,000 to £6,000 or less and to allow it to be paid by a first payment "six months from now" and by further instalments thereafter. The other application, dated 18 March 2015, is to set aside the order for security and to postpone MIH's disclosure, which on 16 January 2015 Teare J ordered be made by 27 February 2015 and which Carr J deferred to 27 March 2015, until "the issue of security for costs is settled". The defendants' application dated 1 April 2015 is for an order that MIH's claim be struck out because it has not complied with Carr J's order, and specifically has not paid £360,000 into court by 27 March 2015 or at all. By order of Burton J of 16 April 2015, the proceedings are stayed pending resolution of these applications.

3. The claim in this litigation is made by an assured against insurers under a hull and machinery policy for an indemnity of $2 million or damages. It alleges the total loss of a motor yacht, which was, it is said, damaged while being hauled out of the water in Antigua. The defences are (i) that the damage was not caused by an insured peril but by wear and tear, (ii) that, if it was caused by negligence, the proximate cause was the assured's want of due diligence, (iii) that the policy has been avoided for misrepresentation, and (iv) that the policy was undervalued.

4. On 12 January 2015 the third defendants applied for security for costs in the sum of £750,000, contending that there was reason to believe that MIH, a company incorporated in the British Virgin Islands ("BVI"), would be unable to pay costs if ordered to do so. It was supported by a witness statement of Mr James Severn, a solicitor with Thomas Cooper LLP, who act for the third defendants. At that time Edwin Coe LLP ("EC") were solicitors on the record for MIH. MIH responded to the application with witness statements of Ms Straub and Mr Lawrence Berger. Ms Straub said that, if the court ordered security for costs, the effect would be "to stifle a genuine claim". Mr Severn replied with a second witness statement.

5. The application came before Carr J on 6 March 2015. On 5 March 2015 EC had obtained an order that they had ceased to act as solicitors for MIH, but it had not been served and so they remained on the record. Counsel for MIH appeared before Carr J, but with instructions only to apply for an adjournment, which was refused. MIH

was not represented on the hearing of the application for security, which was granted in the terms that I have said.

6. The material put before me in support of MIH's applications comprises an email from Mr Berger dated 10 March 2015, an email from Ms Straub dated 16 March 2015 and a witness statement by Ms Straub dated 18 March 2015. Mr Severn responded with a further witness statement. Ms Straub made submissions in support of MIH's applications and in opposition to the defendants' application: she has, she told me, no legal training. The third defendants were represented before me by Mr John Passmore QC, who also represented them before Carr J. It became apparent that the name of MIH had been, or might have been, struck off the register of BVI companies. There was some uncertainty about the position, and I had no information about the implications about a BVI company being struck off. I thought that the position had to be clarified before I decided the applications, and therefore adjourned the hearing. I wished to avoid unnecessary expense, particularly for Ms Straub, who had travelled from Germany for the hearing and who explained her financial constraints. I therefore invited Mr Passmore to submit a note to assist me about the standing of MIH and the applicable legal principles and Ms Straub was content for me to receive it and to proceed to determine the applications without receiving further (oral or written) submissions. Mr Passmore provided a note dated 10 July 2015, which (inter alia) confirms that MIH's name was indeed struck off the register on 1 November 2014 and remains struck off. I am grateful to him and to Ms Straub for her co-operation in overcoming this procedural difficulty.

7. I therefore first consider the significance of MIH being struck off, and whether nevertheless it can make applications in the proceedings. English law recognises foreign corporations and other foreign legal entities, and generally the question whether a foreign corporation exists depends on the law under which it was incorporated: that law decides whether it has come into being and whether it has ceased to exist. In English proceedings, English law as the lex fori decides whether its procedural requirements are met, and so decides, in particular, when a legal person is entitled to bring proceedings or make applications in them. It does not allow proceedings to be brought or pursued by a person who no longer exists: who, if a natural person, is dead and who, if a legal person, has otherwise ceased to exist. But the law of the place of incorporation determines the effect on a company's capacity of an event such its name being struck off the register, and so provides the material for the decision about whether the company exists as a matter of English law: see Dicey, Morris & Collins, The Conflict of Laws (15th Ed, 2014) 30R-009, Banque Internationale de Commerce de Petrograd v Goukassow, [1923] 2 KB 682, 691 per Scrutton LJ.

8. When the name of a company incorporated in England and Wales is struck off the register, the Registrar of Companies must publish notice of this in the Gazette, and on publication the company is dissolved: Companies Act, 2006 s1000(6). I now have evidence that the position in the BVI is different. Mr Hamish Masson, a lawyer with Harney Westwood & Riegels, explained in a letter of 25 June 2015 that, when a BVI company's name is struck off the resister of BVI companies by the Registrar, it can exist for seven years. It is then dissolved automatically under section 216 of the BVI Business Companies Act, 2004 and ceases to exist, although both during and after the seven years period the company can be restored to the register by order of the court:

such an application must be made within ten years of dissolution. The 2004 Act, by section 215, provides that a company that has been struck off may continue to carry on legal proceedings that were instituted on behalf of the company prior to the date of striking-off.

9. If an English company who was party to proceedings is struck off the register, the court will either dismiss them or, as is commonly the more appropriate course if otherwise a chose in action of value would be lost, stay them pending an application to restore the company to the register: Stearns Fashion Ltd v Legal and General Assurance Society Ltd, [1995] 1 BCLC 332. However, given that a BVI company that is struck off has the capacity that Mr Masson describes, it is not, in my judgment, to be regarded as "dead" or no longer extant, and so I do not think that these proceedings could properly be dismissed on the grounds that MIH has been struck off the BVI register and so there no longer is a claimant.

10. This leads to the question whether proceedings should be stayed because of the striking off, and here it is relevant to look at how, once a company has been struck off, anyone can have authority to act on its behalf, a question not asked of or directly covered by Mr Masson. It might be that, if a solicitor is on the record, (s)he is regarded as having some kind of continuing authority to act for the company, but in this case, although EC were on the record when MIH was struck off, they have since come off it. The applications in the name of MIH were made by Ms Straub. Nothing before me explains her authority to do so, but it might well be that, as director or shareholder or both, her authority survived the striking off. But I would not be willing to make orders on MIH's applications on that assumption: if this were crucial, I would require further assistance about it. However, I shall consider the position on the assumption that all the applications are effective in order to decide whether I need further submissions or whether further delay and expense can be avoided.

11. Before I do so, I should refer to another question about MIH's standing and capacity. Carr J's order was that "the Claimant do give security for the Defendant's costs". I was initially led to understand during the hearing on 12 June 2015 that Carr J was unaware that MIH was struck off, and I was therefore concerned that she might, unwittingly, have ordered MIH to do something that it had no capacity to do. However, I have now seen a copy of her ruling on 6 March 2015, in which she said that MIH "may currently be struck off from the BVI register, but the position was unclear", and she continued "In these circumstances, I propose to proceed on the basis that the Claimant is a proper party to the action as claimant. In the event that that proves not to be the case and the action progresses, it is a matter that may need to be addressed in due course". The inference is that Carr J decided either that MIH had capacity to comply with her order or that it did not matter if it did not.

12. I consider first MIH's application to vary Carr J's order. Mr Berger is an American lawyer, and is the majority partner in United States Land Resources LP ("USLR"), an American limited partnership in which the minority partner with a 45% share is Ms Straub's estranged husband. The evidence before Carr J by way of his witness statement and that of Ms Straub was that the legal costs incurred by MIH in bringing these proceedings had been provided by unsecured loans from USLR. Mr Berger said that USLR had faced problems with its cash flow since the financial crisis in 2008, and could not lend, and was not prepared to lend, money for security for costs.

Moreover, when the loans were originally made, he had not known that generally in English litigation an unsuccessful party is ordered to pay the costs of a successful party. This evidence was relied on to support a contention that an order for security would stifle the claim. The third defendants disputed the candour of Mr Berger's and Ms Straub's evidence.

13. Carr J was not satisfied that it was probable that an order for security would stifle the action. Her reasons were these:

    i) Ms Straub's "lifestyle" shows that she has access to "substantial funds" in that she lives in Germany and travels frequently to and from the United States, and had apparently funded litigation in Antigua with the owner of the slipway where the yacht was damaged.

    ii) She considered that Ms Straub had not fully and frankly disclosed her "means and access to means".

    iii) She accepted the defendants' submission that "a veil ha[d] effectively been drawn over Mr Straub's financial position and his willingness to be involved".

    iv) She considered that Ms Straub's financial position too had not been properly explained.

    v) She thought that, given that Mr Berger had chosen to fund the proceedings, there was "nothing unfair" in requiring him to put up security for costs. (Clearly she had in mind the fairness of placing a requirement on MIH that might lead to Mr Berger providing funding: there was no question of the court requiring security directly from a person not before the court and indeed outside the jurisdiction.)

14. Ms Straub put before me further material in support of MIH's applications. First, there is an email from Mr Berger dated 10 March 2015, which sets out a history of how he (presumably through USLR) had come to provide funding, and confirms "I cannot and will not further fund this litigation". Next, there is an email from Ms Straub to the court dated 16 March 2015 in which she said that she is "actively looking to find someone who might do pro bono or work on a no win/no fee basis" and that she had "heard there are groups like hedge funds, that might invest into funding my claim". She said that her "hopes are high". Thirdly, she has served a witness statement dated 18 March 2015, in which (as well as repeating some of her email) she explains the circumstances in which EC ceased to act and gave evidence about her financial position: that her only assets were the damaged yacht and a relatively modest sum by way of some euros in a bank account, and that she has lived in Germany for many years, returning to the United States only once every 2 or 3 years. She explains that she is "given monies for running errands for [her] husband's business", but this work has been "rather erratic through these last years". She refers to her financial relationship with her husband: that they had entered into a pre-nuptial agreement, and how her husband came to give her the yacht "so I could sell her and have financial security in my older years". As for the proceedings in Antigua, she said that MIH did not initiate proceedings but counterclaimed when sued by Antigua Slipway Limited; that she had been told that she was required to "keep the insurers' rights open to sue the Slipway to recover their costs, after they had paid for

repairs", that she had been assisted by a loan from Mr Berger, and when his assistance ceased, the proceedings had ground to a halt. All of this material could have been served before the March hearing when EC were still on the record. Its purpose, however, is to answer Carr J's judgment.

15. Mr Passmore submitted on the application to vary the order of Carr J (i) that in the circumstances there is no proper reason to re-open the application for security, (ii) that, if the application to set aside the order is re-opened, the merits of the application for security should be considered and determined upon the basis only of the evidence that was before Carr J, and (iii) in any event the order should not be set aside.

16. Generally the court will not readily allow a party who has not attended a hearing to have an application re-heard: the court's power to relist an application where it has been heard in a respondent's absence is used sparingly: M A Lloyd & Sons Ltd v PPC International Ltd, [2014] EWHC 41 (QB), where Turner J explained (at para 14) that this approach is dictated by the need for the court to have regard to giving each case an "appropriate share of the court's resources". However, in this case, Carr J gave MIH liberty to apply to vary or to set aside the order, thereby allocating court resources to hearing any application so made. It is suggested by Mr Passmore that this was designed to allow MIH an opportunity to explain why it did not attend, or submit a skeleton argument for, the hearing before Carr J. I do not accept that: that explanation had already been given on the application for an adjournment, and Carr J said, when she refused an adjournment that she would give liberty to MIH to apply to vary or set aside the order (if she was persuaded that "the application [was] of merit") because that would protect "both the integrity of the process and the position of all the parties in the action". She did not intend that the liberty should be exercised only in limited circumstances or for a limited purpose.

17. I also reject Mr Passmore's submission that the court should not entertain further evidence on an application under Carr J's order to set it aside. Carr J did not so direct, prima facie a party is entitled to present relevant evidence in support of an application, and there is no proper reason to exclude relevant evidence on these applications.

18. However, on an application of this kind I am not entirely free to substitute my own assessment of whether security should be ordered or on what terms for that made by Carr J. The principles and the policies behind them identified by Rix LJ in Tibbles v SIG, [2012] EWCA Civ 518 at para 39 in relation to the operation of CPR3.1(7) apply in the circumstances of this case: in view of the provision for liberty to apply, my jurisdiction is broad and unfettered, but it is in the interest of justice that court orders are determinative of the issues to which they relate, and so before an order is set aside or varied something out of the ordinary is required, the prime examples being a material change of circumstances or a material mistake being made by the judge in the first decision, in particular as a result of being misled.

19. In this case there is no material change of circumstances: the new material does not refer to recent events. I have considered whether the new evidence shows that Carr J was materially misled or mistaken for some other reasons. Nothing in it undermines her assessment about whether there had been full and candid disclosure of Ms Straub's financial position: indeed, the new material itself shows that the picture given to Carr J was incomplete. Nor does it undermine the assessment that "a veil

ha[d] effectively been drawn over Mr Straub's financial position and his willingness to be involved". Indeed his evidence did not refer to his funding of the counterclaim in Antigua. I recognise, however, that Ms Straub's evidence denies Carr J's observations about the frequency of her visits to the United States, and I confess that I have not identified the evidence from which Carr J came to that understanding. It also throws light on the funding of the litigation in Antigua. If this evidence is correct, it casts doubt on whether these considerations support an inference that Ms Straub has "substantial funds". But, even if she was mistaken in this regard, I cannot accept that this would have affected Carr J's decision. Its real basis was that there was not proper disclosure of MIH's financial position and what access it had to funding. It is well established that, when it is argued that an order for security will stifle a claim, the party must provide full and candid information about what means are available: Al-Koronky v Time-Life Entertainment, [2007] 1 Costs LR 57, 65-66. Carr J was entitled to conclude that MIH had not satisfied that requirement.

20. I therefore conclude that I should not vary Carr J's order with regard to providing security for costs. If I did, I would be substituting my assessment for that which she made, and it would not be right to exercise my jurisdiction in those circumstances.

21. I next consider MIH's application about the order that costs of £12,000 be paid by 20 March 2015. The financial restraints on which Ms Straub relied are not reason to re-visit Carr J's assessment of what costs were recoverable. I am not persuaded that there is a proper basis for an order extending the time for payment (but I presume to add that I would be surprised if the third defendants rejected sensible proposals for staged payments if they are made).

22. It is convenient next to deal with the defendants' application. I can do so briefly. The real question is whether the proceedings should be dismissed immediately, or whether MIH should be given a last chance to provide the security that Carr J ordered. In my judgment, MIH should be given a last chance, partly because MIH's circumstances are obscured by the striking off, but principally to give Ms Straub a chance to see whether her "high" hopes of finding funding can be realised. But it would not be fair to the defendants to allow this matter to drift on for long. I have decided that the proper order on the defendants' application is that the claim be dismissed unless £360,000 is paid into court by 4.00pm on 2 October 2015. Until then or until the money has been paid into court, the proceedings will be stayed, with liberty to the defendants to apply to lift the stay.

23. In view of this, MIH's application about the date for disclosure is of no practical significance, but for the sake of good order I adjourn it generally. If the money is paid into court, new case management directions will be required.

24. I therefore can decide the applications despite any uncertainty about Ms Straub's authority to bring MIH's applications. If the proceedings are pursued without MIH being restored to the register, that question might need to be revisited.

25. I do not require the parties' attendance when I hand down this judgment. Any applications for consequential orders are to be made in writing by 4.00pm on 2 August 2015. I should be grateful if Mr Passmore would submit an order giving effect to these rulings.